IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

THE SIROCCO COMPANY,
Petitioner,

—against—

THE CITY OF MIAMI.

BRIEF IN SUPPORT OF PETITION.

Opinions.

No opinion was delivered by the Circuit Court of the Eleventh Circuit of the State of Florida. The opinion of the Supreme Court of the State of Florida was filed April 1, 1941 and appears at page 86 of the Record. The opinion of the Supreme Court of Florida on the previous appeal in the same case (*City of Miami* v. *The Sirocco Company*) is reported in 137 Fla. 434, 188 So. 344, and is set forth in the Appendix hereto. That appeal involved a *different* complaint from the one herein involved.

Jurisdiction.

The jurisdiction of this Court is invoked under §237(b) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, §1, 43 Stat. 937, 28 U. S. C. §344(b)).

The judgment of the Supreme Court of Florida, which is the highest court of the State, was entered April 1, 1941 (R. 86-87). Petition for rehearing was denied May 9, 1941 (R. 90). Extension of thirty days for filing petition for certiorari was granted by Mr. Justice Black on July 19, 1941. The petition was filed August 15, 1941.

In the bill of complaint and petition for rehearing rights under the homestead laws were alleged to be in petitioner (R. 58, 59, 63-66, 88-90, *et passim*). (Act March 3, 1891, c. 561, §§5-7, 26 Stat. 1097, 1098, 43 U. S. C. §§161, 162, 165, 173; Act June 3, 1896, c. 312, §2, 29 Stat. 197, 43 U. S. C. §173.)

The bill of complaint and petition for rehearing asserted that the respondent claimed certain rights under the homestead laws but did not possess such rights (R. 66, 70, 72, 89). (Act July 26, 1866, c. 262, §8, 14 Stat. 253, 43 U. S. C. §932.)

The Circuit Court dismissed the complaint (R. 79). This was assigned as error in the Supreme Court of the State (R. 81-82). The Supreme Court affirmed (R. 86-87).

Although the motion to dismiss the complaint (R. 76-78) specified numerous alleged grounds for its dismissal, including the Statute of Limitations (R. 78), non-assignability of the cause of action (R. 78), and ratification of respondent's acts (R. 78), an examination of the complaint discloses these objections to be frivolous, and the first seven alleged objections to the complaint revolved about the question of whether the petitioner or respondent had title to the land under the homestead laws (R. 77).

The opinion of the Supreme Court of Florida upon the prior complaint, reported in 137 Fla. 434, 188 So. 344, and set forth in the Appendix hereto, shows that the frivolous objections advanced were *not* considered by the Florida Court to be ground for dismissal.

The following cases sustain the jurisdiction of this Court:

Seabury v. *Green*, 294 U. S. 165, 168;
Logan v. *Davis*, 232 U. S. 613, 623;
Gauthier v. *Morrison*, 232 U. S. 452, 458;
Graham v. *Gill*, 223 U. S. 643, 644-645.

The questions involved are substantial, since the decision of the Florida Court legalizes the appropriation without compensation of all lands upon which valid entry has been made, if said entry has been canceled through inadvertence or clerical or legal mistake, so long as no patent has been issued.

The Facts.

The facts are stated in the petition (pp. 4-9).

We emphasize the fact that petitioner is possessed of the rights of Pent, who made a valid homestead entry and received a certificate thereon which was erroneously canceled and subsequently ordered reinstated, and that the lands in question were, therefore, not public lands when the respondent appropriated them.

Summary of Argument.

1. The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court, which hold that a homestead entryman whose entry has been erroneously canceled continues to have equitable title.

2. The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court which hold that a purchaser at a tax sale of land upon which a valid homestead entry has been made acquires a good equitable title.

3. The Supreme Court of Florida, having previously dismissed a *former* complaint solely on the Federal question, to wit, on the ground that no homestead entry was shown, disregarded the valid homestead entry shown by the present complaint and thereby it wrongly decided the Federal question involved.

Argument.

POINT I.

The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court which hold that a homestead entryman whose entry has been erroneously canceled continues to have equitable title.

The leading case which deals with the effect of the erroneous cancellation of a homestead entry is *Cornelius* v. *Kessel*, 128 U. S. 456. In that case an action was brought in the State Court for the possession of certain lands under a patent. The defendant set up a prior homestead entry by her predecessor in title upon which payment was made and a receipt issued. The Commissioner of the General Land Office erroneously canceled the said entry, and subsequently, and after the date of the plaintiff's patent, the entry was directed to be reinstated.

The facts in the *Cornelius* case are strongly analogous to those in the case at bar. The only apparent difference in the facts is that the claim of the plaintiff in the *Cornelius* case was based upon a patent, whereas the claim of the City of Miami in the case at bar is based upon a general grant of public lands for highways.

However, this difference creates no difference in the principle, since unless land is public land within

the meaning of the homestead laws, it is equally impossible for title to be acquired in it by either a homestead entry or the building of a highway.

This Court in the *Cornelius* case held that the erroneously canceled entry gave a valid, equitable title to the defendant. Mr. Justice Field delivered the opinion of the Court and said at pages 460-461:

> "* * * When the tract, which was subject to entry, was thus purchased and paid for, it ceased to be subject to the disposal of the United States; it was not in equity their property. *Carroll* v. *Safford,* 44 U. S. 3 How. 441, 460 (11:671, 680); *Witherspoon* v. *Duncan,* 71 U. S. 4 Wall. 210, 218 (18:339, 342). The legal title, it is true, was retained by them, but they held it as trustee for the benefit of the purchaser; and they were bound upon proper application to issue to him a patent therefor. If from inadvertence or mistake as to their rights, or other cause, they afterwards conveyed that title to another, the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title. *Lindsey* v. *Hawes,* 67 U. S. 2 Black, 554 (17:265); *Stark* v. *Starr,* 73 U. S. 6 Wall. 402-419 (18:925-930).
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> "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have pre-

viously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

The opinion further stated at page 463:

"The interest of Davidson in the tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or impaired by the order directing its cancellation. That order was illegally made, and those claiming under him can stand upon the original entry and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner."

Lindsey v. *Hawes*, 67 U. S., 2 Black, 554, cited in the *Cornelius* case, is to the same effect.

Cf.

Sanford v. *Sanford*, 139 U. S. 642.

It is elementary that aside from the question of cancellation which is dealt with in the *Cornelius* case, land upon which a valid entry has been made is not public land, and that the Government cannot dispose of it by highway grant, railroad grant, patent or otherwise.

Hodges v. *Colcord*, 193 U. S. 192;
Hastings & Dakota R. R. v. *Whitney*, 132 U. S. 357.

It is clear that the rights of the petitioner herein stemming from the entry of Pent were not destroyed by the erroneous cancellation of that entry, and that at the time respondent appropriated the lands under the mistaken notion that they were public lands, petitioner's predecessor in title had equitable title to the lands and was entitled to compensation.

The decision of the Florida court is, therefore, in complete conflict with the cases cited above.

POINT II.

The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court which hold that a purchaser at a tax sale of land upon which a valid homestead entry has been made acquires a good equitable title.

In 1895 a tax deed from the State of Florida to Frank White covering the land in question was issued on account of non-payment of State and County taxes for the year 1893 (R. 82). Both these dates were after the Pent entry and issuance of Certificate thereon.

In *Carroll* v. *Safford*, 44 U. S., 3 How. 440, after a valid homestead entry and payment had been made, but before patent was issued, taxes were assessed

against certain land, and the land was sold upon the non-payment of taxes.

The bill prayed that the sale be declared void.

The Court held that though the State was prohibited from taxing public lands, the lands in question after entry were not public, and that they were therefore subject to sale for non-payment of taxes.

In *Witherspoon* v. *Duncan*, 71 U. S., 4 Wall. 210, a similar question was involved. The court said at page 219:

> "* * * when the entry is made and certificate given, the particular land is segregated from the mass of public lands and becomes private property. * * * The power to tax exists as soon as the ownership is changed and this is effected when the entry is made on the terms and in the modes allowed by law."

The land in question was subject to taxation under the *Carroll* and *Witherspoon* cases, since in 1893 and 1895,—the dates of the imposition of the tax and the tax sale,—the Pent entry, which had been erroneously canceled because of conflict with the Gleason patent, covered the said land.

Therefore, Frank White acquired a good equitable title to the land upon the tax sale. With this outstanding title the lands could not be considered public lands within the meaning of the highway grant. Consequently, the action of the City of Miami in appropriating such lands without compensation entitled the petitioner to legal redress.

The Supreme Court of Florida in dismissing the bill of complaint herein, necessarily held that the lands in question were public lands in spite of White's tax deed. Its decision was, therefore, in conflict with the *Carroll* and *Witherspoon* cases.

Petitioner is possessed of the rights of Pent, Gleason and White. Petitioner's predecessor in title, Whitten, entered upon the land and made extensive and expensive improvements and occupied it continuously from 1920 until the appropriation by the respondent.

Whatever view may be taken of the facts, it cannot be doubted that the complaint shows that the petitioner's predecessor in title had equitable title to the lands in question under the homestead laws throughout the years 1926 and 1927, when respondent built the highways involved, and that the decision of the Florida Court in holding otherwise conflicts with applicable decisions of this Court.

POINT III.

The Supreme Court of Florida, having previously dismissed a *former* complaint solely on the federal question, to wit, on the ground that no homestead entry was shown, disregarded the valid homestead entry shown by the present complaint and thereby it wrongly decided the federal question involved.

In *City of Miami* v. *The Sirocco Company*, 137 Fla. 434, 188 So. 344, set forth in the Appendix hereto, the Supreme Court of Florida in considering a previous bill of complaint in this action, held that:

> "If Whitten or Wayne Realty & Investment Company (his predecessor in title) had been homestead entryman in regular course or had legally preempted or taken possession of lots one and two, there would be no question of Appellee's equitable title and its right to recover, but so far as the record discloses, Appellee and all its predecessors in title were nothing more than squatters and had acquired no legal status whatever as to the lands in question at the time of the appropriation by the City" (p. 436).

The complaint involved herein contains voluminous allegations showing the source of petitioner's title in Pent's valid homestead entry and the tax deed of Frank White (Petition, pp. 4-8). Nevertheless, the Supreme Court of Florida merely wrote a *per curiam* opinion in which it said nothing about the complaint except that "It seems to the Court that there is no error in the said final decree" (R. 86).

It does not appear that any consideration whatever was given to the allegations in the complaint showing a valid homestead entry. Since obviously no such consideration was given, the Supreme Court of Florida erred greviously and deprived the petitioner of his lawful property without any justification. If the point was considered, it was decided in complete disregard of the applicable decisions of this Court, and the Supreme Court of Florida apparently felt that it was unnecessary to explain the reasoning by which it arrived at its strange and unrighteous decision.

CONCLUSION.

The questions which this application suggest should be definitely settled by this Court. The decision of the Florida Court is in direct conflict with the applicable decisions of this Court. The decision overturns the settled departmental practice of the Department of the Interior and is sure to cause future uncertainty on the question and much litigation. The decision opens the door to the appropriation of private lands without compensation.

Respectfully submitted,

SOL A. ROSENBLATT,
Counsel for Petitioner.

SOL A. ROSENBLATT,
JOSHUA BINION CAHN,
Of Counsel.